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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1932.**

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# No. 330

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PETER L. McDONNELL, PETITIONER,

*vs.*

THE UNITED STATES.

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**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.**

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*To the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

In support of his petition for a writ of certiorari to the Court of Claims the petitioner respectfully shows:

### Statement of the Matter Involved.

April 1, 1918, the petitioner filed his income-tax return for 1917. On the same date the partnership, McDonnell & Truda, of which petitioner was a member, filed a return of income on Government Form 1065.

March 18, 1923, or thirteen days prior to the running of the statute of limitations for the assessment and collection of additional tax for 1917, the Commis-

sioner of Internal Revenue made a jeopardy assessment against the partnership McDonnell & Truda for the year 1917 in the amount of $100,005.14. The partnership filed a claim in abatement protesting the additional tax.

From the above it is apparent that the jeopardy assessment of $100,005.14, made against the partnership, could not lawfully be collected after April 1, 1924. See *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346; *Russell* v. *United States*, 278 U. S. 181.

November 30, 1925, which was after the expiration of the statute of limitations as stated above, the Commissioner of Internal Revenue wrote the petitioner and his partner, Dominic A. Truda, that the jeopardy assessment of $100,005.14, made against the partnership, was in error and that there was due but $24,863.28 additional tax instead of $100,005.14 (R. 9). The Commissioner stated, however, that he would not reduce the said admittedly erroneous jeopardy assessment of $100,005.14 against the partnership to $24,863.28 unless the petitioner, against whom the statute of limitations had admittedly run, would sign a waiver of the statute of limitations and agree to pay an outlawed tax of $4,386.15 (R. 10, 11). A similar demand was made of the petitioner's partner.

Because of the threat of the Commissioner of Internal Revenue that he would proceed with the collection of the admittedly erroneous $75,141.86 portion of the above mentioned jeopardy assessment, and which was then barred, the petitioner, on February 23, 1926, executed a waiver of the statute of limitations for 1917 with reference to his personal liability.

As will be noted the waiver signed by the petitioner was executed after the enactment of the Revenue Act of 1924 (June 2, 1924) and before the enactment of the Revenue Act of 1926 (February 26, 1926). Section 278 of the 1924 Act provided that the statute of limitations could be waived but Section 278(*e*) specifically provided that this section did not authorize the collection of any tax which was barred prior to its enactment. The United States Circuit Court of Appeals for the Second Circuit, in *Uncasville Manufacturing Co.* v. *Commissioner,* 55 Fed. (2d) 893, has, in direct conflict with the case at bar, held that collection could not legally be made under such circumstances. (See discussion, R. 13, 14.)

Despite the provisions of the statute as above stated the petitioner was compelled to pay and did pay on October 23, 1926, an additional tax of $4,386.15 plus interest of $162.88, or a total of $4,549.03.

A further error of the Court of Claims is as follows:

Section 273 of the Revenue Act of 1926 requires that the Commissioner of Internal Revenue must send by registered mail to taxpayers a notice of deficiency in the event he seeks to collect a deficiency in tax. The Commissioner sent no such registered mail notice in this case and the Court of Claims does not find that a registered mail notice was sent.

> "* * * When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." (*Botany Worsted Mills* v. *United States,* 278 U. S. 282, 289.)

It is settled that deficiencies in tax cannot be legally collected without the sending of the registered mail

notice of deficiency as provided in the statute. *J. H. Reese,* 15 B. T. A. 1261; *Dinwiddie Lampton,* 17 B. T. A. 649; *G. H. Connell,* 15 B. T. A. 1309.

**Basis of Court of Claims Decision.**

The Court of Claims decided in favor of the United States, holding:

(1) That the Circuit Court of Appeals for the Second Circuit was in error in its decision in *Uncasville Manufacturing Co.* v. *Commissioner,* 55 Fed. (2d) 893, wherein the Circuit Court held that where the statute of limitations expired prior to June 2, 1924, the statute does not permit the execution of valid waivers of the statute of limitations between that date and February 26, 1926, the date of the passage of the Revenue Act of 1926.

(2) That the waiver of the statute of limitations signed by the petitioner was not exacted under duress, despite the threat of the Commissioner of Internal Revenue that he would collect $75,141.86 admittedly not due from the partnership of McDonnell & Truda, and which was outlawed, unless the said waiver was signed by the petitioner.

(3) That the sending by the Commissioner of Internal Revenue by ordinary mail of a letter advising of his action on petitioner's protest against the proposed additional tax for 1917 was a compliance with the provision of the statute requiring the sending of a notice of deficiency by registered mail. This despite the fact that the said ordinary mail letter did not state it was

a notice of deficiency or put the petitioner on notice that it was the Commissioner's final action.

**Reasons Relied On for the Allowance of the Writ.**

The writ of certiorari in this case should be allowed for the following reasons:

1. *The Decision is in Direct Conflict With a Decision of the Circuit Court of Appeals for the Second Circuit.*

The decision of the Court of Claims in this case is directly in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *Uncasville Manufacturing Co.* v. *Commissioner*, 55 Fed. (2d) 893, on the question of the validity of waivers of the statute of limitations executed after June 2, 1924, and prior to February 26, 1926, in cases where the statute of limitations had expired prior to June 2, 1924. That the Court of Claims fully recognized this conflict is shown by the lengthy discussion of the Uncasville case in the court's opinion (R. 13, 14).

In the Uncasville case certiorari was sought on other points and denied, 286 U. S. 545.

That the Court of Appeals is correct and the Court of Claims is in error is shown by the language of the statute. Section 278(*c*) of the Revenue Act of 1924 provides for the assessment and collection of a tax after the expiration of the statute of limitations:

> "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be as-

> sessed at any time prior to the expiration of the period agreed upon."

Subsection (*e*) of Section 278 then specifically provides that if the limitation had expired prior to the enactment of the Act it could not be extended. Subsection (*e*) states:

> "This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the period of limitation then in existence or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Because of the conflict above mentioned the writ should be granted in order that the law may be settled.

2. *The Waiver was Executed Under Duress and the Decision on This Point is in Conflict with Board of Tax Appeals Decisions.*

The waiver executed by the petitioner was exacted by duress. In this case the Commissioner of Internal Revenue admitted that the additional tax due from the partnership was $24,863.28 and not $100,005.14 which had been assessed. In addition the entire tax against the partnership was outlawed. The Commissioner stated, however, that he would not remove this admittedly erroneous assessment unless the petitioner executed the waiver of the statute of limitations in his individual case. In other words, the partners

were threatened that an erroneous assessment of $75,-141.86 would be collected from the partnership unless the partners agreed to pay outlawed individual taxes in a smaller amount. It is established that legal duress exists where one is "* * * coerced to do the act in order to escape a greater evil." (*Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 22.)

The Board of Tax Appeals has held that duress was used where the taxpayer signed a waiver of the statute of limitations under threat that a fraud penalty would be assessed if the said waiver was not signed. *Alfred J. Diescher*, 18 B. T. A. 353. In the Diescher case the Board points out (pp. 358 and 359) that if the taxpayer had paid the tax under these circumstances it could have recovered the amount so paid in an action at law. "It would seem very strange, therefore, that a document signed under similar pressure of circumstances could be a voluntary act and more binding than the payment of money."

3. *No Registered Mail Notice of Deficiency Was Mailed Petitioner and the Decision on the Point is in Conflict with Board of Tax Appeals Decisions.*

In this case the deficiency was collected without the mailing of a registered notice of deficiency from which taxpayers have the right of appeal to the Board of Tax Appeals. Section 274(*a*) of the Revenue Act of 1926 states in part:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in

> respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed * * * the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (*d*) or (*f*) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final * * *."

In this case the Court of Claims makes no finding that a registered mail notice of deficiency was mailed but argues that the ordinary mail letter advising of the Commissioner's action on a protest to the additional tax met the requirement of the statute as to the registered mail notice of deficiency. Such a holding is contrary to the decisions of the Board of Tax Appeals. *J. H. Reese,* 15 B. T. A. 1261; *Dimwiddie Lampton,* 17 B. T. A. 649; *G. H. Connell,* 15 B. T. A. 1309.

As the statute now in force retains the requirement that the Commissioner send notices of deficiency by registered mail, taxpayers should be advised by this Court whether the requirement of the statute can be ignored by the Commissioner.

**Conclusion.**

In view of the foregoing the writ as prayed for should be granted.

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